STATE OF MICHIGAN

COURT OF APPEALS

JOEANN BATES,

Plaintiff-Appellee,

v

DR. SIDNEY GILBERT,

Defendant-Appellant,

and

D&R OPTICAL CORPORATION, d/b/a HEALTH CENTER OPTICAL,

Defendant.

UNPUBLISHED
August 16, 2005

Nos. 252022, 252793
Wayne Circuit Court
LC No. 03-308969-NH

JOEANN BATES,

Plaintiff-Appellee,

v

DR. SIDNEY GILBERT,

Defendant,

and

D&R OPTICAL CORPORATION, d/b/a HEALTH CENTER OPTICAL,

Defendant-Appellant.

No. 252047, 252792
Wayne Circuit Court
LC No. 03-308969-NH

Before: Donofrio, P.J., and Murphy and Borrello, JJ.

PER CURIAM.

In Docket Nos. 252022 and 252047, defendants Dr. Sidney Gilbert and D & R Optical Corporation (hereinafter Health Center Optical) appeal by leave granted an order denying their

motion for summary disposition, which sought dismissal of plaintiff's malpractice claim based on plaintiff's failure to file a valid affidavit of merit as required by MCL 600.2912d. In Docket Nos. 252792 and 252793, defendants appeal by leave granted a separate order granting plaintiff's motion to strike Gilbert's affidavit of meritorious defense and both defendants' answers and entering a default against defendants based on the trial court's ruling that Gilbert's affidavit of meritorious defense, which was self-executed, was not valid under MCL 600.2912e, and that Health Center Optical's reliance on Gilbert's affidavit and failure to file its own affidavit of meritorious defense was invalid under MCL 600.2912e and MCR 2.112(L). In Docket Nos. 252022 and 252047, we affirm. In Docket Nos. 252792 and 252793, we reverse and remand for the reasons set forth in this opinion.

I. Facts

On June 18, 2001, plaintiff, who had been experiencing blurred vision, went to Health Center Optical to have her eyes examined. Gilbert, an optometrist licensed to practice in Michigan, performed the examination. According to plaintiff, Gilbert failed to perform a test to determine whether she had glaucoma. On November 2, 2001, plaintiff was diagnosed with severe advanced glaucoma, which has rendered her legally blind. Plaintiff filed a medical malpractice[1] complaint against defendants, alleging that Gilbert's failure to perform glaucoma testing caused her to become permanently blind. As required by MCL 600.2912d, plaintiff attached to her complaint an affidavit of merit. The affidavit of merit was signed by Harry Hamburger, M.D., an ophthalmologist. In the affidavit of merit, Dr. Hamburger articulated the applicable standard of care and averred how Gilbert allegedly breached that standard. In response to plaintiff's complaint, Gilbert filed an answer and an affidavit of meritorious defense as required by MCL 600.2912e. Rather than obtaining an affidavit of meritorious defense from another optometrist, however, Gilbert executed and signed the affidavit of meritorious defense on his own behalf. In the affidavit, Gilbert asserted that his examination of plaintiff's eyes met the standard of care for optometrists and denied that the eye examination was a proximate cause of plaintiff's blindness. Health Center Optical filed its own separate answer that was not accompanied by an affidavit of meritorious defense. Instead, Health Center Optical filed a document purporting to "rel[y] upon the Affidavit of Meritorious Defense filed by Sidney Gilbert, O.D."

Plaintiff moved for the trial court to strike Gilbert's affidavit of meritorious defense and both defendants' answers and enter defaults against defendants or, in the alternative, to grant summary disposition in plaintiff's favor pursuant to MCR 2.116(C)(9) based on defendants' failure to comply with MCL 600.2912e and MCR 2.112(L). According to plaintiff, Gilbert's affidavit of meritorious defense did not comply with MCL 600.2912e because it was self-executed. Plaintiff also argued that MCL 600.2912e and MCR 2.112(L) required Health Center

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[1] A medical malpractice claim may be brought against any "licensed health care professional." MCL 600.5838a(1). A "licensed health care professional" is defined as "an individual licensed or registered under article 15 of the public health code." MCL 600.5838a(1)(b); *Cox v Flint Bd of Hosp Managers*, 467 Mich 1, 19; 651 NW2d 356 (2002). Optometrists are licensed health care professionals under the Public Health Code. MCL 333.17401 *et seq.*

Optical to file its own affidavit of meritorious defense rather than simply rely on Gilbert's affidavit of meritorious defense. The trial court granted plaintiff's motion to strike Gilbert's affidavit of meritorious defense and defendants' answers and entered defaults against defendants regarding all of plaintiff's claims, with the exception of damages.

Defendants also moved for summary disposition pursuant to MCR 2.116(C)(7), (8) and (10), arguing, in part, that plaintiff's affidavit of merit was deficient because it was executed by an ophthalmologist, an expert who was not qualified to testify against Gilbert, an optometrist, under MCL 600.2169(1) because ophthalmology is not the "same health profession" as optometry as required by MCL 600.2912d and MCL 600.2169(1). The trial court denied defendants' motion, ruling that plaintiff's affidavit of merit was valid under MCL 600.2912d because the circumstances were such that plaintiff's attorney's belief that an ophthalmologist was qualified to testify against Gilbert under MCL 600.2169(1) was reasonable.

Defendants appeal by leave granted both the order granting plaintiff's motion to strike Gilbert's affidavit of merit and both defendants' answers and enter defaults against defendants and the order denying defendants' motion for summary disposition.

II. Standard of Review

Resolution of the parties' arguments on appeal requires this Court to construe MCL 600.2912d, MCL 2912e, MCL 600.2169, and MCR 2.112(L). Statutory interpretation is a question of law that this Court reviews de novo. *Atchison v Atchison*, 256 Mich App 531, 534-535; 664 NW2d 249 (2003); *Haworth, Inc v Wickes Mfg Co*, 210 Mich App 222, 228; 532 NW2d 903 (1995). Similarly, the proper interpretation and application of a court rule is a question of law that we review de novo. *Haliw v Sterling Heights*, 471 Mich 700, 704; 691 NW2d 753 (2005).

"In determining whether a party is entitled to judgment as a matter of law pursuant to MCR 2.116(C)(7), a court must accept as true a plaintiff's well-pleaded factual allegations, affidavits, or other documentary evidence and construe them in the plaintiff's favor." MCR 2.116(G)(5); *Farm Bureau Mutual Ins Co v Combustion Research Corp*, 255 Mich App 715, 720; 662 NW2d 439 (2003). Where there are no factual disputes and reasonable minds cannot differ on the legal effect of the facts, the decision regarding whether a plaintiff's claim is barred by the statute of limitations is a question of law that this Court reviews de novo. *Id.*

This Court also reviews de novo a trial court's grant or denial of summary disposition under MCR 2.116(C)(10). *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion brought under MCR 2.116(C)(10) tests the factual support for a claim. *Downey v Charlevoix Co Bd of Co Rd Comm'rs*, 227 Mich App 621, 625; 576 NW2d 712 (1998). The pleadings, affidavits, depositions, admissions, and any other documentary evidence submitted by the parties must be considered by the court when ruling on a motion brought under MCR 2.116(C)(10). MCR 2.116(G)(5); *id.* at 626. When reviewing a decision on a motion for summary disposition under MCR 2.116(C)(10), this Court "must consider the documentary evidence presented to the trial court 'in the light most favorable to the nonmoving party.'" *DeBrow v Century 21 Great Lakes, Inc (After Remand)*, 463 Mich 534, 538-539; 620 NW2d 836 (2001), citing *Harts v Farmers Ins Exchange*, 461 Mich 1, 5; 597 NW2d 47 (1999). A trial court has properly granted a motion for summary disposition under MCR 2.116(C)(10) "if the

affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law." *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996).

III. Docket Nos. 252022 and 252047

The first issue presented for this Court's consideration is whether plaintiff's counsel had a reasonable belief that plaintiff's affidavit of merit, which was executed by Dr. Hamburger, an ophthalmologist, was valid under MCL 600.2912d when offered against a defendant who is an optometrist. The trial court held that under the circumstances, plaintiff's attorney's belief that an ophthalmologist was qualified to testify against an optometrist under MCL 600.2169 was reasonable. For the reasons set forth in this opinion, we agree with the trial court on this issue.

MCL 600.2912d(1) requires a plaintiff initiating a medical malpractice action to "file with the complaint an affidavit of merit signed by a health professional who the plaintiff's attorney *reasonably believes* meets the requirements for an expert witness under section 2169." (Emphasis added.) The statute requires the affidavit of merit to contain certain specific information, including the applicable standard of care, the affiant's opinion regarding whether that standard of care was breached and, if so, the appropriate actions that the health care professional or health care facility should have taken to comply with the standard of care, and the manner in which the breach was the proximate cause of any alleged injury. MCL 600.2912d(1)(a)-(d). MCL 600.2169 provides, in relevant part:

> (1) In an action alleging medical malpractice, a person shall not give expert testimony on the appropriate standard of practice or care unless the person is licensed as a health professional in this state or another state and meets the following criteria:
>
> (a) If the party against whom or on whose behalf the testimony is offered is a *specialist*, specializes at the time of the occurrence that is the basis for the action in the same specialty as the party against whom or on whose behalf the testimony is offered. However, if the party against whom or on whose behalf the testimony is offered is a specialist who is board certified, the expert witness must be a specialist who is board certified in that specialty.
>
> (b) Subject to subdivision (c), during the year immediately preceding the date of the occurrence that is the basis for the claim or action, devoted a majority of his or her professional time to either or both of the following:
>
> (i) The active clinical practice of the same health profession in which the party against whom or on whose behalf the testimony is offered is licensed and, if that party is a specialist, the active clinical practice of that specialty.
>
> (ii) The instruction of students in an accredited health professional school or accredited residency or clinical research program in the same health profession in which the party against whom or on whose behalf the testimony is offered is licensed and, if that party is a specialist, an

accredited health professional school or accredited residency or clinical research program in the same specialty.

(c) If the party against whom or on whose behalf the testimony is offered is a *general practitioner*, the expert witness, during the year immediately preceding the date of the occurrence that is the basis for the claim or action, devoted a majority of his or her professional time to either or both of the following:

(i) Active clinical practice as a general practitioner.

(ii) Instruction of students in an accredited health professional school or accredited residency or clinical research program in the same health profession in which the party against whom or on whose behalf the testimony is offered is licensed. [MCL 600.2169(1) (emphasis added).]

Defendants argue that plaintiff's attorney's belief that an ophthalmologist was qualified to testify against an optometrist under MCL 600.2169(1) was unreasonable, in part, based on our Supreme Court's opinion in *Cox v Flint Bd of Hosp Managers*, 467 Mich 1; 651 NW2d 356 (2002). In *Cox*, the Supreme Court held that a nurse does not engage in the practice of medicine and therefore is not to be held to the standard of care of a general practitioner or a specialist under MCL 600.2912a. *Cox*, *supra* at 18, 20. According to defendants, in light of *Cox*, plaintiff's attorney should have known that MCL 600.2169(1)(a) and (c) do not apply to this case because an optometrist, like a nurse, also does not engage in the practice of medicine and therefore cannot be a specialist or a general practitioner under MCL 600.2169(1)(a) or (c). Furthermore, according to defendants, plaintiff's attorney could not reasonably believe that an ophthalmologist is qualified to testify against an optometrist under MCL 600.2169(1)(b) because ophthalmology and optometry do not constitute "the same health profession." MCL 600.2169(1)(b).

We reject defendants' contention that our Supreme Court's decision in *Cox* renders unreasonable plaintiff's attorney's belief that Dr. Hamburger was qualified to testify against Gilbert. *Cox* involved a nurse, not an optometrist. Moreover, *Cox* did not concern the same issue as presented by this appeal. *Cox* concerned the issue whether nurses should be held to the standard of care of a general practitioner or a specialist under MCL 600.2912a. In contrast, the issue in this case is whether plaintiff's counsel had a reasonable belief that plaintiff's affidavit of merit, which was executed by an ophthalmologist, was valid under MCL 600.2912d when offered against a defendant who is an optometrist. Therefore, we reject defendants' reliance on *Cox* because that case did not interpret the same statutory provisions or address the same issues as those at issue in the instant case.

Whether an attorney's belief is reasonable depends on "the circumstances." See *Geralds v Munson Healthcare*, 259 Mich App 225, 233; 673 NW2d 792 (2003). To ascertain the reasonableness of counsel's belief that an affidavit was sufficient, we examine all of the factors considered by counsel in preparing the affidavit, and the relevant case law at the time of the filing of the affidavit. Because there is a dearth of case law on the issue of qualifications of expert witnesses in malpractice cases against

"health professionals," plaintiff's counsel, in large part, was left to speculate as to the mandated qualifications of a health care professional affiant under MCL 600.2169(1).

Following examination of all the factors listed by plaintiff's counsel in executing the challenged affidavit, and review of relevant case law at the time of the filing of the affidavit, we hold that it not unreasonable for plaintiff's attorney to believe that Dr. Hamburger was qualified to testify against Gilbert under MCL 600.2169(1)(b). Given the dearth of case law addressing the applicability of MCL 600.2169(1) to non-physician defendants in general and to optometrists specifically, under the circumstances of this case, we cannot conclude that plaintiff's attorney's belief that Dr. Hamburger was qualified to testify against Gilbert under MCL 600.2169(1)(b) was unreasonable.

Dr. Hamburger was qualified to give expert testimony against Gilbert if Dr. Hamburger devoted a majority of his professional time, in the year preceding the date of the occurrence, to "[t]he active clinical practice of the same health profession" as Gilbert or "[t]he instruction of students . . in the same health profession" as Gilbert. MCL 600.2169(1)(b). Regardless of whether ophthalmology and optometry are the "same health profession" for purposes of the statute, we find that counsel certainly could have reasonably believed that Dr. Hamburger met the requirements of MCL 600.2169(1)(b). We reach this conclusion given that the terminology "health profession" is vague and reasonably subject to broad interpretation, that optometry and ophthalmology both concern the care and health of one's eyes, that the practice of optometry is arguably subsumed by the field of ophthalmology,[2] that there is a lack of relevant case law on the subject, and that we can appreciate, without ruling upon, counsel's concerns regarding the ability of the expert to address the standard of care and causation. The trial court did not commit error in its ruling.

Moreover, even if plaintiff's counsel was mistaken about the ophthalmologist's qualification to testify as an expert witness under MCL 600.2169(1)(b), such a mistake is not dispositive. This Court has previously held that "[a]n affidavit is sufficient if counsel reasonably, *albeit mistakenly*, believed that the affiant was qualified under MCL 600.2169." *Watts v Canady*, 253 Mich App 468, 471-472; 655 NW2d 784 (2002) (emphasis added). Whether an expert is qualified to testify under MCL 600.2169 and whether a plaintiff's attorney had a reasonable belief regarding whether an expert was so qualified are separate inquiries, and "the Legislature set a lower threshold for evaluating the adequacy of an affidavit of merit." *Id.* at 471.

In sum, for all the reasons articulated above, we conclude that plaintiff's attorney's belief that Dr. Hamburger was qualified to testify against Gilbert was

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[2] Optometry is defined as "the practice or profession of examining the eyes for defects of vision and eye disorders in order to prescribe corrective lenses or other appropriate treatment." *Random House Webster's College Dictionary* (2001). Ophthalmology is defined as "the branch of medicine dealing with the anatomy, functions, and diseases of the eye." *Id.*

reasonable. Therefore, the trial court did not err in denying defendants' motion for summary disposition.

IV. Docket Nos. 252792 and 252793

The first issue presented by this appeal is whether Gilbert's affidavit of meritorious defense, which Gilbert executed and signed on his own behalf, was valid under MCL 600.2912e(1). The trial court ruled that Gilbert's affidavit did not satisfy the statute and granted plaintiff's motion to strike the affidavit. We find it unnecessary to determine whether MCL 600.2912e(1), standing alone and in the context of the surrounding statutory scheme, prohibits a defendant from executing an affidavit of meritorious defense on his or her own behalf, where Gilbert's attorney could have reasonably believed that the affidavit complied with the statute in light of the statutory language that does not specifically preclude a defendant from so doing.

MCL 600.2912e(1) provides, in relevant part:

> [T]he defendant or, if the defendant is represented by an attorney, the defendant's attorney shall file, not later than 91 days after the plaintiff or the plaintiff's attorney files the affidavit required under section 2912d, an affidavit of meritorious defense signed by a health professional who the defendant's attorney reasonably believes meets the requirements for an expert witness under section 2169. . . .

Plaintiff concedes in her brief on appeal that MCL 600.2912e(1) specifically permits a defendant to file an affidavit of meritorious defense on his own behalf if the defendant is not represented by an attorney, but argues that a defendant who is represented by an attorney cannot execute an affidavit of meritorious defense on his or her own behalf. The plain language of MCL 600.2912e(1) does not specifically prohibit a defendant from executing an affidavit of meritorious defense on his or her own behalf. It is therefore unnecessary for us to decide whether a defendant may file such an affidavit on his own behalf because defendant's attorney's belief that Gilbert could execute the affidavit was reasonable given that the plain language of MCL 600.2912e(1) does not specifically prohibit such action. Therefore, the trial court's ruling to strike the affidavit was clearly in error.

While Gilbert's affidavit may not be faulty because he signed the affidavit himself, it may be faulty for the same reasons that render plaintiff's affidavit reasonable. Because Gilbert is an optometrist and not an ophthalmologist, he cannot qualify as an expert on the issues of causation and damages pursuant to MCL 600.2912e(1)(d). However, we read MCL 600.2912(d) and (e) to require counsel to produce an affiant whom they reasonably believe meets the same requirements of 2169, but do not read MCL 600.2912 to require that the affiant be competent to testify at trial. Thus, while Gilbert may not be qualified to testify as an expert on certain issues at trial under MCL 600.2969e(1)(d), his counsel did possess a reasonable belief that Gilbert met the qualifications required of affiants under our interpretation of MCL 600.2912.

The next issue presented by this appeal is whether Health Center Optical's reliance on Gilbert's affidavit of meritorious defense and failure to file its own affidavit was deficient under MCL 600.2912e(1) and MCR 2.112(L). The trial court concluded that Health Center Optical's filing of a document purporting to rely on Gilbert's affidavit of meritorious defense failed to

satisfy MCL 600.2912e(1) and MCR 2.112(L). We agree with the trial court's holding that Health Center Optical failed to comply with MCL 600.2912e(1).

MCR 2.112(L) provides that, "in an action alleging medical malpractice . . . each party must file an affidavit as provided in MCL 600.2912d, 600.2912e." MCL 600.2912e(1) requires a defendant in a medical malpractice case to file "an affidavit of meritorious defense signed by a health professional who the defendant's attorney reasonably believes meets the requirements for an expert witness under section 2169." In this case, Health Center Optical filed a document, which was signed by its attorney, purporting to "rel[y] upon the Affidavit of Meritorious defense filed by Sidney Gilbert, O.D." Heath Center Optical did not file its own affidavit of meritorious defense as is plainly required by MCR 2.112(L) and MCL 600.2912e(1). While neither the statute nor the court rule expressly addresses the issue of a defendant filing a document relying on a co-defendant's affidavit of meritorious defense, both plainly and unambiguously require the filing of an affidavit of meritorious defense. MCL 600.2912e(1) specifically states that a defendant "*shall* file . . an affidavit of meritorious defense." (Emphasis added.) This Court has held that "[t]he use of the word 'shall' indicates that the requirement of [MCL 600.2912e(1)] is mandatory. Therefore, a defendant violates the statute by failing to file an affidavit of meritorious defense within ninety-one days of the plaintiff's filing an affidavit of merit." *Kowalski v Fiutowski*, 247 Mich App 156, 160-161; 635 NW2d 502 (2001) (citation omitted). Similarly, Health Center Optical violated MCL 600.2912e(1) by failing to file an affidavit of meritorious defense. See *id.* at 161. Since MCL 600.2912e(1) clearly and unambiguously requires the filing of an affidavit of meritorious defense, this Court must enforce it as written. *Roberts*, *supra* at 64. The document filed by Health Center Optical purporting to rely on Gilbert's affidavit of meritorious defense was not an affidavit of meritorious defense.

In *Kowalski*, *supra*, this Court observed that MCL 600.2912e is silent regarding the appropriate remedy or sanction to apply when a defendant violates the statute. *Kowalski*, *supra* at 161-162. We reasoned that the Legislature's adoption of an amendment deleting a sanction provision in the statute indicated that the Legislature "intended to leave the determination of a proper remedy to the discretion of the court." *Id.* at 162-163. We also observed that MCL 600.2912e "neither prohibits nor requires a default when the defendant fails to timely file its affidavit of meritorious defense." *Id.* at 163.

In its order granting plaintiff's motion to strike and enter defaults against defendants, the trial court noted defendants' failure to comply with MCL 600.2912e and MCR 2.112(L) and stated that it was granting plaintiff's motion for reasons stated on the record at the hearing on plaintiff's motion. At the hearing on plaintiff's motion, when trial counsel for plaintiff informed the trial court that Health Center Optical had not filed an affidavit of meritorious defense, the trial court characterized Health Center Optical's failure to file an affidavit of meritorious defense as an "[e]gregious, egregious violation of the statute" and ruled that Health Center Optical's conduct required "an automatic default." The trial court's statements on the record indicate that it believed that it was required to automatically enter a default against Health Center Optical and that it had no discretion in fashioning a remedy for Health Center Optical's noncompliance with MCL 600.2912e. In fact, the trial court did have discretion to fashion an appropriate remedy for the violation of the statute. "[A]lthough a default was a permissible remedy, the trial court erroneously believed that it was required by statute to enter a default and that it had no discretion to fashion any other appropriate sanction." *Id.* at 165-166. We find that "the trial court did not

exercise discretion in entering the default and did not consider the possibility of any other remedies." *Id.* at 166. We therefore reverse the portion of the trial court's order entering a default against Health Center Optical and remand for the trial court to reconsider the appropriate remedy for Health Center Optical's noncompliance with MCL 600.2912e. "In selecting a sanction both appropriate and effective in compelling compliance with the statute, the trial court may consider . . . any prejudice to plaintiffs resulting from the delays, and any other factors relevant to the determination." *Id.* In exercising its discretion, the court may well desire to consider the equities of rendering a default in this case, which involved complex interpretation of a convoluted statutory scheme. On remand, the trial court may again conclude that a default is the appropriate remedy for Health Center Optical's noncompliance with the statute. However, "it may reach its conclusion only after exercising its own discretion in the matter." *Id*.

In Docket Nos. 252022 and 252047, we affirm. In Docket Nos. 252792 and 252793, we reverse and remand. We do not retain jurisdiction.

/s/ William B. Murphy
/s/ Stephen L. Borrello